

## **DEPARTMENT OF NAVY PROCEDURES FOR RECEIPT OF DEPOSITION NOTICES AND PERSONNEL SUBPOENAS**

Deposition notices and subpoenas requesting testimony from active duty Sailors and Marines, reserve personnel on extended active duty, civilian employees, Department of the Navy contractors, military retirees and former civilian employees is controlled by Department of Defense Directive 5405.2 and Secretary of the Navy Instruction 5820.8A. Those regulations are published at 32 C.F.R. pts. 97 and 725 (2002) and are issued consistent with 5 U.S.C. § 301 and the Supreme Court holding of United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951). Touhy confirms the authority of the head of a Federal agency to control the release of testimony or other official information.

### **Contents of the Request: 32 C.F.R. 725.7 and 725.8**

In order for a determination to be made regarding any request, you must submit the following information.

1. Names, addresses, and telephone numbers of all counsel and the party represented.
2. Provide the requested individual's full name, Social Security number and current/last duty station.
3. A description, in as much detail as possible, of the testimony sought.
4. A statement of whether factual, opinion, or expert testimony is requested. If expert or opinion testimony is sought, an explanation of why exceptional or unique circumstances exist justifying such testimony, including why it is not reasonably available from any other source.
5. Description of why the information is needed, including:
  - a. A brief summary of the facts of the case and the present posture of the case.
  - b. A statement of the relevance of the matters sought.
6. A statement that you are willing to pay in advance all reasonable expenses and costs associated with your request, including travel expenses and accommodations, if applicable.
7. A statement as to whether the United States, Department of the Navy, or the Department of Defense is or is likely to become a party to the litigation.

**Factual testimony: 32 C.F.R. § 725.4(c)**

Often the information testimony sought is personal information protected from disclosure to third parties under the Privacy Act, 5 U.S.C. § 552a. Under case law interpreting 5 U.S.C. § 552a(b)(11) (release under the order of a court of competent jurisdiction), either a judge-signed subpoena or court order or, in the alternative, written consent from the person to whom the information pertains, is required before information may be released. In many cases there is not enough data in a request to determine if the information asked for is covered by the provisions of the Privacy Act. **Privacy Act concerns are best cured by obtaining a judge-signed subpoena, court order, or release.**

**Expert or opinion testimony: 32 C.F.R. § 725.2(e), 725.4(c) and 725.6**

Without a showing of exceptional need or unique circumstances, section 725.2(e) prohibits current and former Department of the Navy personnel from providing expert or opinion testimony concerning official Department of the Navy or Department of Defense information, subjects, personnel, or activities, except on behalf of the United States or a party represented by the Department of Justice, or with the written special approval of the Judge Advocate General of the Navy. Most importantly, however, is the fact that the anticipated testimony cannot be adverse to the interests of the United States. Pursuant to section 725.6, the proponent must submit to the Department of the Navy for approval a written request specifying in detail the nature of the evidence desired, its availability elsewhere and its relevance to the litigation.

**Service of Process upon the General Counsel: 32 C.F.R. § 725**

A request must comply with the provisions of section 725 including service upon the General Counsel. This applies equally to a judge-signed subpoena, court order, or release. The address is General Counsel of the Navy, c/o Department of the Navy, Washington, D.C. 20350-1000. Service may be in person or by mail, but not by facsimile.

**Fees and Expenses:** Non-federal government requestors and private litigants are responsible for fees and expenses of requested Department of the Navy personnel.

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